In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1163

HAROLD FRANKLIN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals (Pet. App. C) was entered on January 24, 1966. The petition for a writ of certiorari was filed on March 29, 1966.[1] and is therefore out of time under Rule 22–2 of the Rules of this Court. In any event the issue raised by the petitioner does not warrant review by this Court.

After trial by jury in the United States District Court for the Middle District of Georgia, petitioner

[1] Petitioner in his index treats as the denial of a petition for rehearing the granting of a motion to recall the mandate (Pet. A–2). Not only is this not a denial of a petition for a rehearing; the motion was granted after the time for filing a petition for a writ of certiorari had expired.

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was convicted on six counts of violating tax laws relating to distilled spirits. Petitioner was sentenced to two years' imprisonment on each of five counts and twelve months' imprisonment on the remaining count, all to be served concurrently. The court of appeals affirmed *per curiam*.

The relevant evidence showed that an agent of the Alcohol and Tobacco Tax Unit located a still in a wooded area on August 21, 1964 (R. 6).[2] After securing a federal search warrant the agent returned to the still and observed petitioner near the catch-barrel moving around and handling various objects (R. 8–11). The agent then approached the still and, after advising petitioner of his rights, spoke to him about its operation (R. 11, 13). Petitioner admitted running the still and living in the barn nearby, but he denied that he worked on the bottling (R. 14, 21, 22). Approximately thirty-five gallons of untaxed liquor were confiscated and destroyed.

Petitioner took the stand and on cross-examination the government (for purposes of impeachment) asked about three prior convictions involving distilled spirits (R. 49–50). The court instructed the jury as follows:

> There is certain testimony in this case for a limited purpose, namely, testimony referred to generally as impeaching testimony. It appears from the evidence that this defendant has either pleaded guilty or been convicted heretofore to some felonies involving violations

[2] "R." designates the record on appeal and transcript of trial which is on file with the Clerk of this Court.

> of the whiskey laws. That evidence would not be here except for the fact that the defendant is a witness in this case. And that evidence is properly here for such value as you desire to ascribe to it and such as you think you should, in determining and passing upon the credibility of the witness in this case.
>
> When you come to the function of comparing the defendant's testimony with the testimony of other witnesses, weighing testimony, comparing testimony, then the fact of prior convictions of felonies is a pertinent and material fact so as to be admissible in evidence. You would not convict this defendant in this case just because he was guilty on other occasions, but you may consider that record in passing upon the credibility of the witness, because the law says that a person may be impeached by the proof of a prior conviction of felonies [R. 63, 64].

Petitioner admits that the instruction is correct insofar as it deals with credibility, but argues that it was error to say that prior convictions could be considered in comparing testimony of one witness with another (Pet. 6–8). Reading the instruction as a whole, it is evident that the language used was simply another way of saying that the convictions could be considered in determining credibility. The court specifically pointed out that the prior convictions could not be the basis for conviction in this case.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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